Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DEBORAH A. MAYS, PETITIONER,
v.
CITY OF TAMPA, RESPONDENT

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Eleventh Circuit

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APPENDIX BOOK ONE

DEBORAH A. MAYS, *Petitioner, Pro Se*
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68 pp

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-16556
Non-Argument Calendar

D.C. Docket No. 00-02179-CV-T-17-MA

DEBORAH A. MAYS,

Plaintiff-Appellant,

Versus

CITY OF TAMPA, FL

Appeal from the United States District Court for the
Middle District of Florida

(May 23, 2003)
Before DUBINA, HULL, and MARCUS, Circuit Judges,

PER CURIAM:

Deborah Mays ("Mays"), proceeding pro se, appeals the grant of the City of Tampa's ("the City") motion for

summary judgment in her employment action. Mays claims violations of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12112, Title VII of the Civil Rights Act, 42 U.S.C. § § 2000e(k), 2000e-3, and the Florida Civil Rights Act (FCRA), State Fla. Stat. § 760. After review, we affirm.

I. BACKGROUND

We outline the history of Mays's employment because it demonstrates how the plaintiff's employer made considerable efforts to accommodate her disability and her pregnancy, and how Mays suffered no adverse employment action. On January 13, 1997, Mays began working for the City as a Police Data Terminal Operator, which position was later reclassified as an Office Support Specialist II. Mays's duties included processing criminal reports, performing data entry, responding to telephone requests from law enforcement personnel, and responding to counter requests for record information from police officers and the public.

At the beginning of her employment, Mays performed all of the duties of her position. However, approximately one month into her employment, Mays asked the City for assistance in handling her assigned telephone duties due to a hearing impairment. The City accommodated Mays by providing her with a volume-controlled telephone.

In September 1998, Mays's hearing impairment

apparently worsened and she asked her supervisor to relieve her from answering the telephone and handling customer service matters at the front desk. The City accommodated Mays's request. As a result of her decreased telephone and front-counter duties, Mays was assigned additional work in her other job duties, such as data entry. Mays did not complain that she was assigned too much work.

At approximately the same time that Mays was relieved of telephone and front-counter duties, she complained that the other employees were ridiculing her and complaining because she did not answer the telephone or perform the other duties of her position, such as counter duties. The City subsequently issued a written order to all employees in Mays's department stating that ridicule or complaints would not be tolerated. Immediately following this order, the ridicule and complaints stopped.

On February 5, 1999, Mays requested and was granted a medical leave of absence from February 13, 1999 through May 10, 1999. She returned to work on May 10, 1999 with the same accommodations she had prior to taking her leave. In August 1999, Mays told her supervisor, Sheila Bradley, that she needed to "stay off her feet" during the day due to her pregnancy. On October 1, 1999, Mays provided a letter to this effect from Dr. Steven L. Greenberg, her obstetrician. The City accommodated Mays be removing all duties which

required her to be on her feet by providing her a foot rest to keep her feet elevated, and by allowing her to use another employee's data entry desk. The only job duty that Mays could perform while staying off her feet was data entry.

On September 8, 1999, supervisor Bradley issued a memo regarding work assignments. The memo stated that all employees were required to enter four data entry reports per hour in addition to performing their other essential job functions. On September 16, 1999, Bradley issued a memo to Mays stating that she would be required to enter eight reports per hour because she was not performing the other functions of her position.

On November 9, 1999, Mays began her maternity leave without pay, which was to last through January 8, 2000. On December 28, 1999, Mays requested, and was granted, an extension of maternity leave from January 8, 2000 through February 14, 2000. On February 15, 2000, while Mays was on maternity leave, supervisor Bradley completed Mays's performance evaluation. The evaluation rated Mays as either "fully meets expectations," "excellent," or "outstanding" in eleven of twelve categories. Mays received a "below expectations" in one category; communications ability. Bradley's comment stated that: "To date Ms. Mays has not performed the duties of answering the telephone or front counter assistance with the public. She states this is due to hearing loss." Mays's overall rating as 3.8 out of a

possible 5 points. Mays disagreed with the rating. Ken Perry, the City's labor relations manager, reviewed Mays's evaluation and ordered the rating assigned to Mays for communications ability be changed to "fully meets expectation." However, Mays's overall rating of 3.8 was not changed.

Subsequently, Mays made an additional request for an extension of her maternity leave from February 14, 2000 through April 2, 2000. On March 28, 2000, Mays again requested and was granted an extension of leave from April 2, 2000 through May 8, 2000. On May 3, 2000, Mays submitted her resignation.

II. PROCEDURAL HISTORY

On April 10, 2000, Mays filed her first charge of discrimination with the EEOC. Mays complained that the "below expectations" rating was discrimination in violation of the ADAD. On August 16, 2000, the EEOC issued its right to sue letter based on this charge of discrimination.

On October 23, 2000, Mays filed her second charge of discrimination alleging Title VII retaliation. She stated that "after telling my supervisor that I needed an accommodation due to medical complications I was having because of my pregnancy, she retaliated against me by assigning me more work than it was humanly possible to complete." On March 19, 2001, the EEOC issued Mays a right to sue letter. Enclosed with the letter was a document indicating that the EEOC could not

investigate Mays's charge because it was not filed within the time limit required by law. On December 14, 2000, the EEOC sent a letter to Mays indicating that her notice of right to sue was being revoked, and that her charge was being reopened for investigation.[1] On October 23, 2000, Mays also filed her pro se complaint in the district court, which alleged a claim for disability discrimination in violation of the ADA and the FCRA. On January 10, 2001, an attorney entered an appearance on Mays's behalf, and she continued to be represented by counsel until the district court granted summary judgment in favor of the City.

On June 4, 2001, Mays filed a motion to amend her complaint to add claims of "pregnancy retaliation" under the ADA, pregnancy discrimination and retaliation under Title VII, and discrimination and retaliation under the FMLA. The district court denied the motion on June 22, 2001.

On November 30, 2001, the City filed its motion for summary judgment. On August 22, 2002, the district court dismissed Mays's complaint without prejudice and instructed Mays to file an amended compliant asserting a cause of action for disability discrimination under the ADA and FCRA with respect to her hearing impairment, and retaliation under Title VII. On October 29, 2002, the

[1] In the December 14, 2000 letter, the EEOC stated that the charge had been dismissed initially as untimely because the EEOC believed the matter was brought to its attention more than 300 days after the incident giving rise to the charge. The EEOC concluded that, upon review, Mays's allegations were initially raised with the filing of the April 10, 2000 charge but because of EEOC error, they had not been included on the face of the charge. Therefore, the EEOC deemed the second charge timely.

district court granted the City's motion for summary judgment based on Mays's re-pled complaint. Mays timely appealed.

III. DISCUSSION

A. Pregnancy Discrimination and Retaliation

On appeal, Mays, pro se, argues that the district court erred in granting summary judgment to the City on the issues of pregnancy discrimination under the ADA and

retaliation under Title VII.[2] A plaintiff alleging a retaliation claim under Title VII must show:(1) that she engaged in statutorily protected activity, (2) that an adverse employment action occurred, and (3) that the adverse action was causally related to her protected activities. Coutu v. Martin County Bd. Of County Comm'rs, 47 F.3d 1068, 1074 (11th Cir. 1995). To establish a prima facie case of disability discrimination under the ADA, a plaintiff must establish that she: (1) is disabled, (2) is a qualified individual, and
(3) has suffered an adverse employment action because of her disability. Doe v. Dekalb County Sch. Dist., 145 F. 3d 1441, 1445, (11th Cir. 1998).[3]

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[2] This Court review district court's grant of summary judgment du novo, construing the facts in the light most favorable to the non-moving party. Lowe v. Alabama Power Co., 244 F.3d 1305, 1307 (11th Cir. 2001). "Summary judgment is proper if the pleadings, depositions, and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a latter of law." Id at 1307 (quotation marks and citation omitted).

[3] Although Mays was directed specifically by the district court to replead only complaints for disability discrimination with respect to her hearing impairment, and retaliation under Title VII, the district court addressed her pregnancy discrimination claims. Thus, we do so here. Further Mays does not argue on appeal that the district court erred in granting summary judgment to the City on her ADA claims regarding her hearing

Mays cannot make out a prima facie case of disability discrimination or retaliation because she did not suffer an adverse employment action.[4] Mays claims that her negative evaluation and the amount of work she received constitute adverse employment actions. "An employment action is considered 'adverse' only if it results in some tangible, negative effect on the plaintiff's employment". Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1261 (11th Cir. 2001).

A negative performance evaluation, standing alone, does not constitute an adverse employment action. Id. Further, "[a] proposed action that is corrected as soon as the proper official is made aware of it and before it goes into effect, so that the employee does not actually suffer any consequence, is not 'adverse.'" Gupta v. Florida Bd. Of Regents, 212 F.3d 571, 588 (11th Cir. 2000). Mays's "below expectations" rating in communications ability was changed to "fully meets expectations" and Mays does not allege how the overall performance evaluation adversely affected the terms and conditions of her

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impairment, and thus she waives that issue. Marek v. Singletary, 62 F. 3d 1295, 1298 n.2 (11th Cir. 1995) (issues not argued on appeal deemed waived).

[4] Because the district court found, and Mays does not challenge on appeal, that her pregnancy was not a disability, Mays cannot meet the first prong of the prima facie case for disability discrimination in any event.

employment. Mays points only to the fact that the evaluation was conducted during her leave period; however, she concedes that she was scheduled to come into the office on the day her evaluation was conducted to complete some paperwork. Moreover, the evaluation was related to her hearing impairment and not her pregnancy, and Mays fails to make any arguments on appeal regarding her hearing impairment.

Further, the amount of work she was required to perform did not constitute an adverse employment action. Because Mays was unable to perform her telephone duties and because her doctor ordered that she remain off her feet, she could not perform all of the tasks required of her position. As a result, the City required Mays to enter eight data entry reports per hour instead of four. A reasonable person in the same circumstances would expect to bear additional responsibilities in one area of the job if she were unable to perform other functions of her position. See generally Davis v. Town of Lake Park,, 245 F.3d 1232, 1244-45 (11th Cir. 2001) ("Work assignment claims strike at the very heart of an employer's business judgment and expertise because they challenge an employer's ability to allocate its assets in response to shifting and competing market priorities.").[5]

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[5] The district court construed Mays's pregnancy discrimination claim as a claim under the ADA. We note that Mays could not sustain a claim for pregnancy discrimination under the

Again, because Mays has failed to establish an adverse employment action against her, the district court correctly granted the City's motion for summary judgment regarding Mays's pregnancy discrimination and retaliation claims.[6]

B. Motion to Amend

On appeal, Mays also argues that the district court

Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) either because she did not suffer an adverse employment action. See Spivey v. Beverly Enter., Inc., 196 F.3d 1309, 1312 (11th Cir. 1999) (setting out elements for prima facie case under PDA, including that plaintiff suffer adverse employment action).

[6] Mays also argues on appeal that "the district court erred in its conclusion that Mays' FCRA retaliation claim was futile because Mays had not filed a civil action before the expiration of the mandatory 180-day period required by Florida Statutes 760.11." A close reading of the district court's summary judgment order indicates that the district court did address Mays's FCRA retaliation claim and determined that because Mays could not prevail on her Title VII retaliation claim, she could not prevail on her FCRA retaliation claim either. We agree. See Harber v. Blockbuster Entm't Corp., 139 F.3d 1385, 1387 (11th Cir. 1998).

abused its discretion by denying her motion to amend to add a claim of pregnancy discrimination.[7]

The district court did not abuse its discretion because the information the district court had at that time indicated that the pregnancy discrimination claim she sought to include in her amended complaint was untimely. However, even if the district court's decision to deny Mays's motion to amend her complaint to include a pregnancy discrimination claim was in error, such error was harmless because this claim ultimately was decided by the district court.

Mays also argues that the district court erred by not allowing her to amend her complaint to add a FMLA claim. We disagree. Mays had knowledge of the facts giving rise to this claim prior to filing her initial complalint, yet she waited seven and a half months after filing her initial complaint to bring the claim. Under these circumstances, the district court did not abuse its discretion by denying her motion to amend her complaint to include a FMLA claim. See McGregor v. Autozone, Inc., 180 F3.d 1305, 1309 (11th Cir. 1999) (FMLA "[p}laintiff did not seek to amend until 2 months after the deadline was one month away, plaintiff and defendant's representatives has been deposed, and plaintiff had

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[7] This Court reviews a district court's denial of a motion to amend for abuse of discretion. Hinson v. Clinch County, Georgia Bd. Of Educ., 231 F.3d 821, 826 (11th Cir. 2000).

knowledge of the information contained in the proposed amendment when she filed the lawsuit").

C. Dismissal of Other Claims

Next, Mays argues that the district court erred by dismissing her claims for constructive discharge, failure to accommodate, and disability harassment. The district court determined that these claims were not reasonably related to the discrimination complaints in her EEOC charges. A timely filed EEOC charge is a prerequisite to bringing suit under Title VII. Moore v. Ala. St. Univ., 864 F.2d 103, 104 (11th Cir. 1989), and under the ADA Maynard v. Pneumatic Prods, Corp., 256 F.3d 1259, 11262 (11th Cir. 2001). Further, "[a} plaintiff's judicial complaint is limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." Mulhall v Advance Sec., Inc. 19 F.3d 586, 589 n.8 (11th Cir. 1984).

We do not decide whether the district court properly concluded that Mays's claims were not reasonably related to her EEOC charges because none of these claims can survive on the merits in any event. With respect to her failure to accommodate claim, Mays did not identify a reasonable accommodation that the City denied her. See Willis v. Conopco, Inc., 108 F.3d 282, 284-85, 287 (11th Cir. 1997) (concluding that a plaintiff bringing failure to accommodate claim must at least identify a reasonable accommodation to establish a claim for failure to accommodate). With respect to the disability harassment

claim, there was no evidence that any harassment was sufficiently severe or pervasive as to alter a term or condition of Mays's employment, and the evidence indicates that as soon as Mays complained about co-worker harassment, the City took prompt, effective remedial action. See Walton v. Mental Health Ass'n of Southeastern Pa., 168 F.3d 661, 667 (3d Cir. 1999).

With respect to the constructive discharge claim, there is no evidence that the City made Mays's working condition so intolerable that a reasonable person would have resigned. Hill v. Winn-Dixie Stores, Inc., 934 F.2d 1518, 1527 (11th Cir. 1991). At most, the City gave her increased desk work to make up for relieving her of other duties and gave her one "below expectations" evaluation, which was later changed. This is insufficient to support a cliam for constructive discharge. Id.; see also Wardwell v. Sch. Bd. Of Palm Beach County, 786 F.2d 1554, 1558 (11th Cir. 1986) (employer's failure to promote employee together with employee's added workload did not rise to level of constructive discharge).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DEBORAH A. MAYS,

Plaintiff,

v. CASE NO.: 8:00-CV-2179-T-17 MAP
CITY OF TAMPA,

Defendant.
_____/

ORDER

THIS CAUSE is before the Court on Defendant's Motion for Summary Judgment and Supporting Memorandum of Law (Dkt. No. 31); and Plaintiff's Memorandum of Law in opposition to Defendant's Motion for Summary Judgment (Dkt. No 39).

Background

Plaintiff, Deborah Mayes (Plaintiff), began her employment with Defendant, City of Tampa (Defendant), on January 13, 1997 as an office Support Specialist II (OSS II). The primary duties of the OSS II position

include processing criminal reports, entering data into the computer, responding to telephone requests from law enforcement personnel, and responding to requests for record information from police officers and the general public, among other responsibilities.

Because Plaintiff suffers from a hearing impairment, a result of contracting spinal meningitis in 1988, she requested an accommodation from Defendant to help with her telephone responsibilities. In response, Defendant provided a volume-controlled telephone, which aided in her performance of her telephone duties; however, Plaintiff claimed that her hearing so severely declined that even the volume-controlled telephone did not help her. In September 1998, Plaintiff requested to be relieved from telephone duty, and her supervisor at that time, Jim Crews, notified Plaintiff that she needed a doctor's note to be relieved from her telephone responsibilities. As such, Plaintiff provided a note from Dr. Jay Farrior, in which Dr. Farrior stated that Plaintiff could not "rely on her hearing for clear communication, particularly using telephones and other types of devices." Thereafter, Defendant relieved Plaintiff of all of her telephone duties.

Also, in September 1998, Plaintiff complained to Crews that other employees were ridiculing her because she did not answer the phone; however, she admitted that she never heard the other employees making comments nor did she know who these employees were. In response, Major K.C. Newcomb, supervisor of the

administrative division, issued an order to all employees that "any ridicule, criticism and/or complaint directed towards [Plaintiff] will not be tolerated and will result in discipline." Thereafter, the criticism toward Plaintiff stopped.

Plaintiff took leave of absence from February 13, 1999 through May 10, 1999 and, upon her return, was given the same accommodations that she had prior to her leave. In August, 1999, Plaintiff informed her then supervisor, Sheila Bradley, that she had to stay off of her feet during the day and she could only perform data entry, and, in October 1999, Plaintiff submitted a letter from Dr. Stanley Greenberg stating that, due to difficulty with Plaintiff's pregnancy, she was to stay off of her feet as much as possible while at work. Bradley then took Plaintiff off all duties that required Plaintiff to be on her feet, and Defendant also provided her with a foot rest to keep her feet elevated.

In September 1999, Bradley issued a memorandum stating that all employees must enter four data entry reports per hour, in addition to performing the other essential job functions. After Plaintiff received the original memorandum, Bradley then issued a memorandum to only Plaintiff, stating that she would be required to enter eight reports per hour because she was not performing any other duties required of her position. Plaintiff took maternity leave without pay from November 9, 2000 through January 8, 2000, and then

requested an extension of her leave, which was granted, through February 14, 2000. After making two additional requests, Plaintiff extended her leave of absence until May 8, 2000.

In February 2000, while Plaintiff was on leave, Bradley completed Plaintiff's performance evaluation, which evaluated Plaintiff on all essential functions of her position. In eleven of the twelve categories, Plaintiff received ratings of "fully meets expectation," "excellent," and "outstanding." However, Plaintiff received a "below expectations" in communications ability because she did not perform the duties of answering the telephone or assisting the public at the front counter. After reviewing her evaluation, Ken Perry, Defendant's labor relations manager, ordered that Plaintiff's communications ability rating be changed to "fully meets expectations."

On May 3, 2000, Plaintiff submitted her resignation to Bennie R. Holder, chief of police for the city of Tampa Police Department, effective May 8, 2000. Prior to her resignation, Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), alleging that Defendant discriminated against her on the basis of her disability when it gave her the unfavorable performance evaluation. Plaintiff then filed suit in this Court on October 23, 2000, asserting causes of action against Defendant for violations of the Americans with Disabilities Act (ADA), Title 42, United States Code, Section 12112, the Civil Rights Act of 1964 (Title

VII), Title 42, United States Code, Section 2000e, *et seq.*, and the Florida civil Rights Act (FCRA), Florida Statutes, Chapter 760.

Standard of Review

Summary judgment is appropriate "if the pleadings, Depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c). The moving party bears the initial burden of stating the basis for its motion and identifying those portions of the record demonstrating the absence of genuine issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-324 (1986). That burden can be discharged if the moving party can show the Court that there is "an absence of evidence to support the nonmoving party's case." Id at 323,325. When the moving party has discharged its burden, the nonmoving party must then designate specific facts showing that there is a genuine issue of material fact. Id at 324.

Issues of fact are "'genuine' only if a reasonable jury considering the evidence presented could find for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). Material facts are those that will affect the outcome of the trial under governing law. Id. At 248. In determining whether a material fact exists, the court must consider all the evidence in the light most favorable to the nonmoving party. Sweat V. Miller

Brewing Co., 708 F.2d 655 (11th Cir. 1983). All doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. Hayden v. First Natl. Bank of Mt. Pleasant, 595 F.2d 994, 996-997 (5th Cir. 1979).

The court may not weigh the credibility of the parties on summary judgment. Rollins v. TechSouth, Inc., 833 F.2d 1525, 1531 (11th Cir. 1987). If the determination of the case rests on which competing version of the facts or events is true, the case should be submitted to the trier of fact. Id.

Discussion

A. Scope of EEOC Complaint

Defendant moves for summary judgment on the grounds that certain claims filed in her complaint are not within the scope of Plaintiff's EEOC charge and, thus, are not actionable. Specifically, Defendant argues that Plaintiff's EEOC charge is silent as to her reasonable accommodations claims, her disability harassment claims, and her constructive discharge claims contained within her complaint. Because these claims are not reasonably related to her disability discrimination charges contained in her EEOC charges, Defendant asserts that it must be granted judgment as a matter of law as to these claims. Conversely, Plaintiff argues that the pregnancy discrimination claims were alleged in her first charge of discrimination, as evidenced by the EEOC's letter of December 14, 2000.

The beginning point for determining the permissible scope of the judicial complaint is the EEOC charge and investigation. Eastland v. Tennessee Valley Authority, 714 F.2d 1066, 1067 (11th Cir. 1983). "A plaintiff's judicial complaint is limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." Mulhall v. Advance Sec. Inc., 19 F3d 586, 589 n. 8 (11th Cir. 1994). "Allowing a complaint to encompass allegations outside the ambit of the predicate EEOC charge would circumvent the EEOC's investigatory and conciliatory role, as well as deprive the charged party of notice of the charge, as surely would an initial failure to file a timely EEOC charge." Schnellbaecher v. Baskin Clothing Co., 887 F.2d 124, 127 (7th Cir. 1989). Accordingly, although the EEOC complaint does not need to include every detail that will be alleged in the judicial complaint, the substance of the claim must fall within the scope of the "administrative investigation that can be reasonably expected to follow the charge of discrimination." Park v. Howard University, 71 F.3d 904, 907-909 (D.C. Cir. 1995).

Because the Court ordered Plaintiff to amend her complaint to conform to her EEOC charge as detailed in the Court's August 222, 2002 Order, the Court denies Defendant's motion as to this issue.

B. ADA Claims

Defendant moves to dismiss Plaintiff's ADA claim on the grounds that she cannot establish a *prima facie* case of disability discrimination under the ADA.

The Americans with Disabilities Act (ADA) prohibits employers from discriminating on the basis of a known physical or mental impairment of a qualified individual with a disability. 42 U.S.C. § 12112. Under the ADA, employers must provide reasonable accommodations for known disabilities "unless doing so would result in undue hardship upon the employer." Morisky v. Broward County, F.3d 445, 447 (11th Cir. 1996).

To establish a *prima facie* case of discrimination under the ADA, a plaintiff must show that she "1) has a disability; 2) is a qualified individual' and 3) was unlawfully subjected to discrimination because of her disability." Id. In addition, a plaintiff must demonstrate that the employer had either actual or constructive knowledge of the disability or considered the employee to be disabled. Id.

1. Disability

For the purposes of this motion, Defendant concedes that Plaintiff's hearing impairment is a disability under the ADA; however, it argues that her pregnancy is not a disability. Plaintiff concedes that normal pregnancies are not considered a disability for the purposes of the ADA; however, she contends that her pregnancy was abnormal

and that her complications, as a result, constituted a disability under the ADA.

Under the ADA, the term "disability" means (1) a physical or mental impairment that substantially limits one or more of the major life activities of an individual; (2) a record of such an impairment; or (3) is regarded as having such an impairment. 42 U.S.C. § 12102. It is clearly established that pregnancy *per se* does not constitute disability under federal law. See C.F.R. § 1630.2(h) (1) (stating that "conditions, such as pregnancy, that are not the result of a physiological disorder are . . . not impairments"); e.g. Farrell v Time Service, Inc., 178 F. Supp. 2d 1295, 1298 (N.D. Ga. 2001); Walsh v. Food Supply, Inc., 1997 WL 401594, at *2 (M.D. Fla. 1997); Lehmuller v. Incorporated Village of Sag Harbor, 944 F. Supp. 1087, 1093 (E.D. N.Y. 1996); Villarreal v. J.E. Merit Constructors, Inc., 895 F. Supp. 149, 152 (S.D. Tex. 1995).

Moreover, at most, courts have held that pregnancy may rise to the level of a disability if there are severe complications. Farrell, 178 F. Supp.2d at 1298 (citing Darian v. Univ. of Mass. Boston, 980 F. Supp. 77, 80 (D. Mass. 1997); and Cerrato v. Durham, 941 F. Supp. 388, 392 (S. D. N.Y. 1996)). The interpretative guidance accompanying the ADA regulations states that "temporary, non chronic impairments of short duration, with little or no long-term or permanent impact, are usually not disabilities.: 29 C.F.R., Pt. 1630, App.

§1630.2(j) at 339. Thus, courts have concluded that "pregnancy and related medical conditions do not, absent unusual circumstances, constitute a [disability] under the ADA." Lacoparra v. Pergament Home Centers, Inc. 982 F. Supp. 213, 227 (S..D.N.Y. 1997) (quoting Villarreal, 895 F. Supp. At 152). The severity, duration, and impact of pregnancy-related medical conditions are issues to be determined on a case-by-case basis. Id.

Here, Plaintiff alleges that she suffered complications as a result of her pregnancy. Plaintiff's doctor, Steven L. Greenberg, M.D., notified Defendant on October 1, 1999 that Plaintiff was having increasing pain and lower abdominal discomfort while on her feet, but that she did not necessarily need to be off on total disability. (Def. Exh. E, Dkt. No. 32). After looking at the record, the Court finds that Plaintiff's pregnancy complications were not unusually severe to warrant the definition of "disability" under the ADA. Further, there is no evidence that any of her conditions were chronic or resulted in long-term or permanent impact. Therefore, the Court finds that Plaintiff did not suffer a disability as a result of her pregnancy, and Defendant's motion for summary judgment must be granted as it relates to Plaintiff's claims for disability discrimination as a result of her pregnancy.

2. Qualified Individual

Next, Defendant argues that Plaintiff cannot prove

that she is a "qualified individual with a disability" because she could not perform the essential function of her position. In response, Plaintiff contends that she was a qualified individual because, of the nine tasks that made up her job, answering the telephone was only a marginal function of her position.

A "qualified individual with a disability" is an "individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111 (8).

"Disability" under the ADA is defined as (1) a physical or mental impairment that substantially limits one or more of the major life activities of an individual; (2) a record of such an impairment; or (3) is regarded as having such an impairment. 42 U.S.C. § 12102.

The ADA requires that an employer provide reasonable accommodations to a disabled individual, unless such accommodations would result in an undue hardship for the employer. Morisky, 80 F. 3d at 447. An accommodation is reasonable, as required under the ADA, if it enables the employee to perform the essential functions of the job, which consist of the "fundamental job duties of the employment positions as differentiated from 'marginal' functions." LaChange v. Duffy's Draft House, Inc., 146 F. 3d 832, 835 (11th Cir. 198).

The ADA regulations identify three factors that can be considered pursuant to an inquiry regarding whether a

particular task is an essential part of a job: "(1) the reason the position exists is to perform the function; (2) there are a limited number of employees available among whom the performance of the job function can be distributed; and (3) the function is highly-specialized so that the incumbent in the position was hired for his or her expertise or ability to perform the particular function." Holbrook v. City of Alpharetta, Georgia, 112 F. 3d 1522, 1526 (11th Cir. 1997) (citing 29 C.F.R. § 1630 .2 (n) (2) (i) – (iii)).

Because Plaintiff was only unable to perform her telephone duties, one of nine specific tasks required of her position, due to her disability, the Court finds that this job function is not the fundamental job duty of her position and that she could perform the essential functions of her position. Therefore, Plaintiff was a "qualified individual" for the purposes of the ADA.

3. Adverse employment action

An adverse employment action is "an ultimate employment decision, such as a discharge or failure to hire, or other conduct that 'alters the employee's compensation, terms, conditions, or privileges of employment, deprives him or her of employment opportunities, or adversely affects his or her status as an employee.'" Gupta, 212 F. 3d at 587 (quoting Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997)). To determine whether there is sufficient action to constitute adverse employment action, the court must look

at each claim on a case-by-case basis, using a subjective and an objective standard. Id. (citing Anderson v. Coors Brewing Co., 181 F. 3d 1171, 1178 (10th Cir. 1999)).

In this Circuit, an employee must show a serious and material change in the terms, conditions, or privileges of employment, and the employee's subjective view of the significance of the employer's action is not controlling; rather, the employment action must be materially adverse to a reasonable person under the circumstances. Davis v. Town of Lake Park 245 F.3d 1232, 1239 (11th Cir. 2001) (citing Doe v. Dekalb County Sch. Dist., 145 F.3d 1441, 1453 (11th Cir. 1998)).

Plaintiff claims that her negative performance evaluation and her increased workload were adverse employment action as a result of her disability. Courts in this Circuit, as well as in other Circuits, have continually held that low performance evaluations are not adverse employment actions for the purposes of Title VII.[8] As the Eleventh circuit stated in Davis v. Town of Lake Park, Florida,

> Employer criticism, like employer praise, is an ordinary and appropriate feature of the workplace.

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[8] In Doe v. Dekalb County School District, the Eleventh Circuit held that the test for determining adverse employment action under the ADA is identical to the test under Title VII case law. 145 F.3d 1441, (11th Cir. 1998).

> Expanding the scope of (the ADA) to permit discrimination lawsuits predicated only on unwelcome day-to-day critiques and assertedly unjustified negative evaluations would threaten the flow of communication between employees and supervisors and limit an employer's ability to maintain and improve job performance. Federal courts ought not to be put in the position of monitoring an second-guessing the feedback that an employer gives, and should be encouraged to give an employee. . . . . (T)he loss of prestige or self-esteem felt by an employee who received what (s)he believes to be unwarranted job criticism or performance review will rarely – without more – establish the adverse action necessary to pursue a claim under (the ADA's antidiscrimination clause.

245 F.3d 1232, 1242 (11th Cir. 2001) (emphasis added) .Moreover, Plaintiff's evaluation about which she complains was changed to "fully meets expectations" as her final evaluation. Therefore, the Court finds that Plaintiff did not suffer adverse employment action as result of her disability.

Similarly, in looking at Plaintiff's increased workload, "Title VII . . . [is not] a statute making actionable the 'ordinary tribulations of the workplace.'" Id. At 587 (quoting Anderson v. Coors Brewing Co., 181 F..3d 1171, 1178 10th Cir. 1999) (citation omitted)).

Because Plaintiff was unable to perform her telephone duties and because her doctor ordered that she remain off of her feet, she could not perform all of the tasks required of her position. As a result, Defendant asked Plaintiff to enter eight data entry reports per hour, as opposed to the four that she was required to enter previously. A reasonable person in the same circumstances would expect to bear additional responsibilities in one area of her job if she was unable to perform other functions of her position.

Increased workloads are an "ordinary tribulation of the workplace" for which employees should expect to take responsibility. In addressing the issue of whether unfair work assignments are adverse employment actions for the purposes of Title VII, the Eleventh Circuit stated that,

> [w]ork assignment claims strike at the very heart of an employer's business judgment and expertise because they challenge an employer's ability to allocate its assets . . . . The same concern exists for public entities . . . which must balance limited personnel resources with the wide variety of critically important and challenging tasks expected of them by the public.

Davis, 245 F.3d at 1244. Likewise, this Court will not infringe on the business judgment of Defendant. This Court's place is not to determine the workload that

employers should place on its employees or how to divide up the functions that each employee performs. See Elrod v. Sears, Roebuck Co., 939 F. 2nd 1466, 1470 (11th Cir. 1991) (stating that the purpose of Title VII is not to make federal courts "sit as a super-personnel department that reexamines an entity's business decision"). Therefore, the Court finds that the additional workload place on Plaintiff was not an adverse employment action because of Plaintiff's disability.

Because Plaintiff did not suffer adverse employment action as a result of her discrimination, the Court finds that she cannot establish a *prima facie* case of disability discrimination under the ADA, and Defendant's motion for summary judgment must be granted as to Count I. See Doe v. Dekalb County School District, 145 F. 3d 1441, 1447 (11th Cir. 1998) (holding that adverse employment action is an essential element of a *prima facie* ADA case).

C. Retaliation Claim

Plaintiff alleges that she was retaliated against in violation of Title VII and the Florida Civil Rights Act because she received a poor performance evaluation after she complained that she was discriminated against.

To establish a *prima facie* case of retaliation under Title VII, a plaintiff must prove the following elements: (1) she participated in an activity that Title VII protects; (2) she suffered an adverse employment action; and (3) there is a causal connection between the participation in

the protected activity and the adverse employment decision. Gupta v. Fla. Bd. Of Regents, 212 F.3d 571, 587 (11th Cir. 2000) (citing Farley v. Nationwide Mutual Ins., 197 F. 3d 1322, 1336 (11th Cir. 1999)).

Once the plaintiff has established a *prima facie* case of retaliation, "the burden shifts to the defendant to rebut the presumption of retaliation by producing legitimate reasons for the adverse employment actions." Raney v. Vinson Guard Servs., 120 F..3d 1192, 1197 (11th Cir. 1997) (quoting Hairston v. Gainesville Sun Publg. Co., 9 F.3d 913, 918 (11th Cir. 1993)). If the defendant proffers legitimate reasons, the presumption of retaliation is rebutted and drops from the case. At the summary judgment stage, "the burden then shifts back to the plaintiff to raise a genuine factual issue as to whether the defendant's proffered reason is a pretextual ruse to mask a retaliatory action." Id. (citing Hairston, 9 F.3d at 921).

As stated above, the Court finds that Plaintiff did not suffer adverse employment action as a result of her disability. Therefore, Plaintiff cannot establish a *prima facie* of retaliation under Title VII, and Defendant's motion for summary judgment as to Count II must be granted.

D. Florida Civil Rights Act

Florida courts have held that decisions construing Title VII are applicable when considering claims under the Florida civil Rights Act because the Florida Act was

patterned after Title VII. Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385, 1387 (11th Cir. 1998) (citing Ranger Ins. Co. v. Bal Harbour Club, Inc., 549 S.2d 1005, 1009 (Fla. 1989); and Florida State Univ. v. Sondel, 685 S.2d 310, 312 (Fla. Dist App. 1996)). "No Florida court has interpreted the [Florida Civil Rights Act] to impose substantive liability where Title VII does not." Id. Because Plaintiff has failed to establish a *prima facie* case of either discrimination under the ADA or retaliation under Title VII, the Court finds that summary judgment as to Count III must be granted in favor of Defendant. Accordingly, it is

ORDERED that Defendant's Motion for Summary Judgment (Dkt. No. 31) be **GRANTED.** The clerk of court is directed to enter final judgment in favor of Defendant and to close this case.

DONE AND ORDERED in Chambers, in Tampa, Florida this 29th day of October, 2002.

ELIZABETH A. KOVACHEVICH
Chief United States District Judge

Copies to: All parties and counsel of record

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DEBORAH A. MAYS,

Plaintiff,

vi. CASE NO.: 8:00-CV-2179-T-17 MSS
CITY OF TAMPA,

Defendant.
_____/

ORDER

THIS CAUSE is before the Court on Defendant's Motion for Summary Judgment and Supporting Memorandum of Law (Dkt. No. 31); and Plaintiff's Memorandum of Law in opposition to Defendant's Motion for Summary Judgment (Dkt. No 39).

Background

Plaintiff, Deborah Mayes (Plaintiff), began her employment with Defendant, City of Tampa (Defendant),

on January 13, 1997 as an office Support Specialist II (OSS II). The primary duties of the OSS II position include processing criminal reports, entering data into the computer, responding to telephone requests from law enforcement personnel, and responding to requests for record information from police officers and the general public, among other responsibilities.

Because Plaintiff suffers from a hearing impairment, a result of contracting spinal meningitis in 1988, she requested an accommodation from Defendant to help with her telephone responsibilities. In response, Defendant provided a volume-controlled telephone, which aided in her performance of her telephone duties; however, Plaintiff claimed that her hearing so severely declined that even the volume-controlled telephone did not help her. In September 1998, Plaintiff requested to be relieved from telephone duty, and her supervisor at that time, Jim Crews, notified Plaintiff that she needed a doctor's note to be relieved from her telephone responsibilities. As such, Plaintiff provided a note from Dr. Jay Farrior, in which Dr. Farrior stated that Plaintiff could not "rely on her hearing for clear communication, particularly using telephones and other types of devices." Thereafter, Defendant relieved Plaintiff of all of her telephone duties.

Also, in September 1998, Plaintiff complained to Crews that other employees were ridiculing her because she did not answer the phone; however, she admitted that she never heard the other employees making comments

nor did she know who these employees were. In response, Major K.C. Newcomb, supervisor of the administrative division, issued an order to all employees that "any ridicule, criticism and/or complaint directed towards [Plaintiff} will not be tolerated and will result in discipline." Thereafter, the criticism toward Plaintiff stopped.

Plaintiff took leave of absence from February 13, 1999 through May 10, 1999 and, upon her return, was given the same accommodations that she had prior to her leave. In August, 1999, Plaintiff informed her then supervisor, Sheila Bradley, that she had to stay off of her feet during the day and she could only perform data entry, and, in October 1999, Plaintiff submitted a letter from Dr. Stanley Greenberg stating that, due to difficulty with Plaintiff's pregnancy, she was to stay off of her feet as much as possible while at work. Bradley then took Plaintiff off all duties that required Plaintiff to be on her feet, and Defendant also provided her with a foot rest to keep her feet elevated.

In September 1999, Bradley issued a memorandum stating that all employees must enter four data entry reports per hour, in addition to performing the other essential job functions. After Plaintiff received the original memorandum, Bradley then issued a memorandum to only Plaintiff, stating that she would be required to enter eight reports per hour because she was not performing any other duties required of her position.

Plaintiff took maternity leave without pay from November 9, 2000 through January 8, 2000, and then requested an extension of her leave, which was granted, through February 14, 2000. After making two additional requests, Plaintiff extended her leave of absence until May 8, 2000.

In February 2000, while Plaintiff was on leave, Bradley completed Plaintiff's performance evaluation, which evaluated Plaintiff on all essential functions of her position. In eleven of the twelve categories, Plaintiff received ratings of "fully meets expectation," "excellent," and "outstanding." However, Plaintiff received a "below expectations" in communications ability because she did not perform the duties of answering the telephone or assisting the public at the front counter. After reviewing her evaluation, Ken Perry, Defendant's labor relations manager, ordered that Plaintiff's communications ability rating be changed to "fully meets expectations."

On May 3, 2000, Plaintiff submitted her resignation to Bennie R. Holder, chief of police for the city of Tampa Police Department, effective May 8, 2000. Prior to her resignation, Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), alleging that Defendant discriminated against her on the basis of her disability when it gave her the unfavorable performance evaluation. Plaintiff then filed suit in this Court on October 23, 2000, asserting causes of action against Defendant for violations of the Americans

with Disabilities Act (ADA), Title 42, United States Code, Section 12112, the Civil Rights Act of 1964 (Title VII), Title 42, United States Code, Section 2000e, *et seq.*, and the Florida civil Rights Act (FCRA), Florida Statutes, Chapter 760.

Standard of Review

Summary judgment is appropriate "if the pleadings, Depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c). The moving party bears the initial burden of stating the basis for its motion and identifying those portions of the record demonstrating the absence of genuine issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-324 (1986). That burden can be discharged if the moving party can show the Court that there is "an absence of evidence to support the nonmoving party's case." Id at 323,325. When the moving party has discharged its burden, the nonmoving party must then designate specific facts showing that there is a genuine issue of material fact. Id at 324.

Issues of fact are "'genuine' only if a reasonable jury considering the evidence presented could find for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). Material facts are those that will affect the outcome of the trial under governing law. Id. At 248. In determining whether a material fact exists, the

court must consider all the evidence in the light most favorable to the nonmoving party. Sweat V. Miller Brewing Co., 708 F.2d 655 (11th Cir. 1983). All doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. Hayden v. First Natl. Bank of Mt. Pleasant, 595 F.2d 994, 996-997 (5th Cir. 1979).

The court may not weigh the credibility of the parties on summary judgment. Rollins v. TechSouth, Inc., 833 F.2d 1525, 1531 (11th Cir. 1987). If the determination of the case rests on which competing version of the facts or events is true, the case should be submitted to the trier of fact. Id.

Discussion

Scope of EEOC Complaint

Defendant moves for summary judgment on the grounds that certain claims filed in her complaint are not within the scope of Plaintiff's EEOC charge and, thus, are not actionable. Specifically, Defendant argues that Plaintiff's EEOC charge is silent as to her reasonable accommodations claims, her disability harassment claims, and her constructive discharge claims contained within her complaint. Because these claims are not reasonably related to her disability discrimination charges contained in her EEOC charges, Defendant asserts that it must be granted judgment as a matter of law as to these claims. Conversely, Plaintiff argues that the pregnancy discrimination claims were alleged in her first charge of

discrimination, as evidenced by the EEOC's letter of December 14, 2000.

The beginning point for determining the permissible scope of the judicial complaint is the EEOC charge and investigation. Eastland v. Tennessee Valley Authority, 714 F.2d 1066, 1067 (11th Cir. 1983). "A plaintiff's judicial complaint is limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." Mulhall v. Advance Sec. Inc., 19 F3d 586, 589 n. 8 (11th Cir. 1994). "Allowing a complaint to encompass allegations outside the ambit of the predicate EEOC charge would circumvent the EEOC's investigatory and conciliatory role, as well as deprive the charged party of notice of the charge, as surely would an initial failure to file a timely EEOC charge." Schnellbaecher v. Baskin Clothing Co., 887 F.2d 124, 127 (7th Cir. 1989). Accordingly, although the EEOC complaint does not need to include every detail that will be alleged in the judicial complaint, the substance of the claim must fall within the scope of the "administrative investigation that can be reasonably expected to follow the charge of discrimination." Park v. Howard University, 71 F.3d 904, 907-909 (D.C. Cir. 1995).

First, the Court notes that Plaintiff originally proceeded *pro se* in this case, as reflected in her original complaint. As such, looking at the complaint, it is difficult, at times, for this court to determine what causes

of action Plaintiff is asserting under the ADA and the FCRA. Moreover, she has completely failed to allege any cause of action under Title VII, as provided in her EEOC charge. After examining the EEOC charges, the letters from the EEOC, and Plaintiff's complaint, the court finds that Plaintiff has asserted causes of action for disability discrimination under the ADA and the FCRA and a cause of action for retaliation under Title VII of the Civil Rights Act of 1964 (Title VII), Title 42, United States Code, Section 2000e, *et seq.* Additionally, the Court finds that these are the only claims that are reasonably related to the claims set forth in the EEOC charge.

For example, in her first charge, filed in April 2000, Plaintiff asserts that she was given a low evaluation because of her disability. In her second charge, filed in October 2000 (which the EEOC found stemmed from her originally filed EEOC charge), Plaintiff alleged that she was retaliated against because she needed accommodations for her pregnancy in violation of Title VII. Then, in her complaint, Plaintiff alleges that Defendant failed to reasonably accommodate her hearing disability and that she was constructively discharged. In looking at both the EEOC charges and Plaintiff's complaint, the Court finds that the allegations found in the complaint would not reasonably be expected to grow out of the EEOC charge of discrimination and, therefore, must be dismissed from the complaint.

At this point, the Court finds that Defendant's motion for summary judgment must be deferred, and Plaintiff must replead her complaint. Plaintiff is reminded that, to comply with Rule 8 of the Federal Rules of Civil Procedure, at a minimum, the complaint must provide a "short and plain statement of the claim" that "will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47 (1957) (quoting Fed. R. Civ. P. 8(a) (2)). In looking at Plaintiff's complaint, as it stands now, it is difficult to ascertain exactly what causes of action that Plaintiff was attempting to set forth. Therefore, Plaintiff is to set forth each cause of action, under separate counts, with a short and plaint statement of facts to support each claim.

Moreover, in repleading her complaint, Plaintiff is to assert only those claims that are reasonably related to her EEOC charge, namely, her disability discrimination claims under the ADA and the FCRA as they relate to her hearing impairment and her retaliation claims under Title VII. Additionally, Plaintiff is not to add any new causes of action. Finally, the Court will defer its ruling on Defendant's pending summary judgment motion until after Plaintiff has filed her amended complaint and Defendant has responded. The parties are not to refile their summary judgment motions or oppositions, or to provide any more discovery supporting or opposing the motion. Accordingly, it is

ORDERED that Plaintiff's Complaint (Dkt. No 1) be **DISMISSED** with leave to amend; and Defendant's Motion for Summary Judgment (Dkt. No. 31) be **DEFERRED.** Plaintiff has ten (10) days from the date of this Order to file her amended complaint, and Defendant has ten (10) days from the date that the amended complaint is filed with this Court to file its responsive pleading.

DONE AND ORDERED in Chambers, in Tampa, Florida, this 22nd day of August, 2002.

ELIZABETH A. KOVACHEVICH
Chief United States District Judge

Copies to: All parties and counsel of record

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DEBORAH A. MAYS,

Plaintiff,

vii. CASE NO.: 8:00-CV-2179-T-17 MAP
CITY OF TAMPA,

Defendant.
_____/

PLAINTIFF'S MOTION TO RECONSIDER COURT'S ORDER DATED JUNE 22, 2001 AND PLAINTIFF'S RENEWED MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

Plaintiff, DEBORAH A. MAYS, pursuant to Rule 60, Rules 6 and 15, Fed.R.Civ.P., and Rule 3-01, Local Rules of the Middle District of Florida, hereby moves the Court for the entry of an order reconsidering the Court's decision issued on June 22, 2001. In support of this motion, the Court is shown as follows:

1. Part of this motion addresses that portion of the Court's decision not to allow Plaintiff to amend her complaint to add a claim of Pregnancy Discrimination. The other part addresses the Court's decision not to allow Plaintiff to add a claim under the Family Medical Leave Act.
2. On June 22, 2001, the Court issued an order denying Plaintiff's Motion for Leave to File Amended Complaint. See Dkt. 23.
3. The basis for the Court's denial of that amendment was that the Court believed that Plaintiff had first raised the issue of pregnancy discrimination with the EEOC on October 23, 2000, when Plaintiff filed her additional Charge of Discrimination with the EEOC.

DENIED As To Reconsideration And Leave To File and so ORDERED this 22nd day of March 2002.

ELIZABETH A. KOVACHEVICH
U.S. District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DEBORAH A. MAYS,

Plaintiff,

CASE NO.: 8:00-CV-2179-T-17

A
CITY OF TAMPA,

Defendant.
_____/

PLAINTIFF'S MOTION
FOR LEAVE TO FILE CORRECT EEOC
NOTICE OF RIGHT TO SUE LETTER

Plaintiff, DEBORAH A. MAYS, pursuant to Rule 15, Fed.R.Civ.P., and Rule 3.01, Rules of the Middle District of Florida, hereby moves the Court for the entry of an order allowing her to file the Notice of Right to Sue Letters from the EEOC. In support of this motion, the Court is shown as follows:

1. On or around October 23, 2000, Plaintiff filed her complaint, *pro se*, asserting a claim of disability discrimination under the ADA. At that time, Plaintiff omitted from her complaint a copy of the Notice of Right to Sue Letter from the EEOC on that claim.
2. On or around November 21, 2000, Plaintiff filed what she believed to be the Notice of Right to Sue Letter from the EEOC on her ADA claim, EEOC Charge No. 151A01079. However, that Notice was an incorrect one, which was related to Plaintiff's claim of pregnancy discrimination, EEOC Charge No.151A10131, which was not yet before the Court in her complaint.
3. Plaintiff now seeks leave of the Court to file the correct Notice of Right to Sue in her ADA claim.

GRANTED AND SO ORDERED this 22nd day of March, 2002.

_____

ELIZABETH A. KOVACHEVICH
U.S. DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DEBORAH A. MAYS,

Plaintiff,

CASE NO.: 8:00-CV-2179-T-17MAP

CITY OF TAMPA,

Defendant.
_____/

ORDER

THIS cause is before the Court on the following:

Dkt. 19 Motion for Leave to File Amended Complaint.
Dkt. 20 Response
Dkt. 21 Supporting Materials

Plaintiff seeks leave to file an Amended Complaint to add additional claims to her claim of disability discrimination.

Defendant opposes the filing of an Amended Complaint. Defendant argues the amendments are futile because Plaintiff did not file an EEOC Charge of Discrimination within the time limits permitted by law. Plaintiff filed an additional Charge of Discrimination on October 23, 2000 for events that occurred from October 1, 1999 through November 4, 19999. The filing date is beyond the permitted time limit, and there are no reasons in the record to toll the limitations period.

Defendant further argues that the FCRA retaliation claim is futile because Plaintiff filed a civil action before the expiration of the mandatory 180 day period required by Fla. Stat. 760.11. See Ayers v. Wal-Mart Stores, Inc., 941 F. Supp. 1163, 1167 (M..D. Fla. 1996). As to the FMLA claim, Defendant argues that Defendant exceeded Plaintiff's twelve week entitlement, and the proposed Amended Complaint does not allege any circumstances supporting an FMLA violation claim. Defendant further argues that Plaintiff knew of all the facts underlying her requested claims when Plaintiff filed her original complaint.

After consideration, the Court concludes that the filing of the proposed Amended Complaint would be futile. Accordingly, it is

ORDERRED that Plaintiff's Motion For Leave to File Amended Complaint is **denied.**

DONE AND ORDERED in Chambers, in Tampa, Florida on this 22nd Day of June, 2001.

ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:
All parties and counsel of record

APPENDIX G

U.S. Department of Justice
Civil Rights Div: 7
NOTICE OF RIGHT TO SUE
WITHIN 90 DAYS

CERTIFIED MAIL
Section
0924 3166

Employment Litigation

P.O. Box 65968
Washington, DC 20034-5968
August 16, 2000

Ms. Deborah A. Mays
P.O. Box 19433
Tampa, FL 33686

RE: EEOC Charge Against City of Tampa, Police Department
No. 151A01079

Dear Ms. Mays:

Because you filed the above charge with the Equal Employment Opportunity Commission, and the Commission has determined that it will not be able to investigate and conciliate that charge within the 180 days of the date of the Commission assumed jurisdiction over the charge and the Department has determined that it will

not file any lawsuit(s) based thereon within that time, and because you have specifically requested this Notice, you are hereby notified that you have the right to institute a civil action under Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. 12111, et seq., against the above-named respondent.

If you choose to commence a civil action, such suit must be filed in the appropriate Court within 90 days of your receipt of this Notice. If you cannot afford or are unable to retain an attorney to represent you, the Court may, at its discretion, assist you in obtaining an attorney.

If you plan to ask the Court to help you find an attorney, you must make this request to the Court in the form and manner it requires. Your request to the Court should be made well before the end of the time period mentioned above. A request for representation does not relieve you of the obligation to file suit within this 90-day period.

The investigative file pertaining to your case is located in the EEOC Tampa Area Office, Tampa, FL.

This Notice should not be taken to mean that the Department of Justice has made a judgment as to whether or not your case is meritorious.

Sincerely,
Bill Lann Lee
Assistant Attorney General
Civil Rights Division

By

Karen L. Ferguson
Civil Rights Analyst
Employment Litigation Section

cc: Tampa Area Office, EEOC
City of Tampa, Police Department

APPENDIX H

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DISMISSAL AND NOTICE OF RIGHTS

To:	From:
Deborah Mays Post Office Box 19433 Tampa, FL 33686	U.S. Equal Employment Opportunity Commission Tampa Area Office 501 E. Polk Street, Room 1020 Tampa, Florida 33602

[ ] On behalf of person(s) aggrieved whose identity is CONFIDENTIAL (29 CFR § 1601.7(A))

Charge No.	EEOC Representative	Telephone No.
151A10131	Gary Frey	(813)228-2310

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

[ ] The facts alleged in the charge fail to state a claim under any of the statutes enforced by the EEOC.

[ ] Your allegations did not involve a disability that is covered by the American with Disabilities Act.

[ ] The Respondent employs less than the required number of employees or is not otherwise covered by the statutes.

[X] We cannot investigate your charge because it was not filed within the time limit required by law.

[ ] Having been given 30 days in which to respond, you failed to provide information, failed to appear or be available for interviews/conferences, or otherwise failed to cooperate to the extent that it was not possible to resolve your charge.

[ ] While reasonable efforts were made to locate you, we were not able to do so.

[ ] You had 30 days to accept a reasonable settlement offer that affords full relief for the harm you alleged.

[ ] The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

[ ] The EEOC has adopted the findings of the state or local fair employment practices agency that investigated this charge.

[ ] Other (briefly state)_____

- NOTICE OF SUIT RIGHTS -
(See the additional information attached to this form)

Title VII, the American with Disabilities Act, and/or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may pursue this matter further by bringing suit in federal or state court against the

respondent(s) named in the charge. If you decide to sue, you must sue WITHIN 90 DAYS from your receipt of this Notice. Otherwise your right to sue based on the above-numbered charge will be lost.

Equal Pay Act (EPA): EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible. (If you file suit, please send a copy of your court complaint to this office).

On behalf of the Commission

_____ _____

Manuel Zurita, Area Director (Date mailed)

Enclosure
Copy of Charge

cc: Mr. Herb Rahming
Employee Relations
City of Tampa
308 East Jackson Street, 7th North
Tampa, FL 33602

APPENDIX I

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
501 East Polk Street, Room 1020
Tampa, FL 33602
(813) 228-2310
TTY (813) 228-2003
FAX (813) 228-2841

14 December 2000

Deborah Mays
Post Office Box 19433
Tampa, Florida 33686

Charging Party

City of Tampa/Police Department
411 North Franklin Street
Tampa, Florida 33602

Respondent

RE: EEOC Charge No. 151 AO 1079
And EEOC Charge No. 151 A1 0131

As noted on the attached Notice of Revocation, the Dismissal and Notice of Right to Sue issued in charge number 151 A1 0131 on December 8, 2000, is hereby

revoked, and the charge has been reopened for investigation.

The charge was initially dismissed as untimely filed, because we believed the matter was brought to the EEOC more than 300 days after the incidents giving rise to the charge. On appeal, the Charging Party asserted that the allegations had initially been raised in charge Number 151 AO 1079, but through administrative error the EEOC had not placed them on the face of the charge. On further review, we have concluded that the allegations were initially raised with the filing of charge number 151 AO 1079. Through administrative error the EEOC failed to appropriately annotate the allegations on the face of the charge. Therefore, the instant charge is deemed to have been received on April 10, 2000, and is therefore, timely filed.

Please refer to any questions in this regard to the undersigned.

_____

Manuel Zurita, Area Director

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
501 East Polk Street, Room 1020
Tampa, FL 33602
(813) 228-2310
TTY (813) 228-2003
FAX (813) 228-2841

EEOC Charge No.: 151A10131

Deborah Mays
Post Office Box 19433
Tampa, Florida 33686
CHARGING PARTY

City of Tampa/Police Department
411 North Franklin Street
Tampa, Florida 33602
RESPONDENT

NOTICE OF REVOCATION

Pursuant to Section 1601.19(b) of the Commission's Procedural Regulations, I issued, under the authority

vested in me, a Dismissal and Notice of Rights to the above named Charging Party.

To more fully effectuate the purposes of Title VII, as amended, I hereby revoke the Dismissal and Notice of Rights dated December 8, 2000. The investigation on the merits of this charge shall resume.

On Behalf of the Commission:

Date	Manuel Zurita Area Director

APPENDIX J

U.S. Department of Justice
Civil Rights Div: 7
NOTICE OF RIGHT TO SUE
WITHIN 90 DAYS

CERTIFIED MAIL
Section
0923 1156

Employment Litigation

P.O. Box 65968
Washington, DC 20034-5968

March 19, 2001

Ms. Deborah A. Mays
c/o Yveline F. Paul, Esquire
Paul & Associates Law Firm
Attorneys at Law
P.O. Box 13167
Tampa, FL 33681-3167

RE: EEOC Charge Against City of Tampa, Police Dept., et al
No. 151A10131

Dear Ms. Mays:

Because you filed the above charge with the Equal Employment Opportunity Commission, and the Commission

has determined that it will not be able to investigate and conciliate that charge within the 180 days of the date of the Commission assumed jurisdiction over the charge and the Department has determined that it will not file any lawsuit(s) based thereon within that time, and because you have specifically requested this Notice, you are hereby notified that you have the right to institute a civil action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, et seq., against the above-named respondent.

If you choose to commence a civil action, such suit must be filed in the appropriate Court within 90 days of your receipt of this Notice.

The investigative file pertaining to your case is located in the EEOC Tampa Area Office, Tampa, FL.

This Notice should not be taken to mean that the Department of Justice has made a judgment as to whether or not your case is meritorious.

Sincerely,

William R. Yeomans
Acting Assistant Attorney General
Civil Rights Division

By

Karen L. Ferguson
Civil Rights Analyst

Employment Litigation Section

cc: Tampa Area Office, EEOC
City of Tampa, Police Dept., et al.

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DEBORAH A. MAYS, PETITIONER,
v.
CITY OF TAMPA, RESPONDENT

CERTIFICATE OF SERVICE

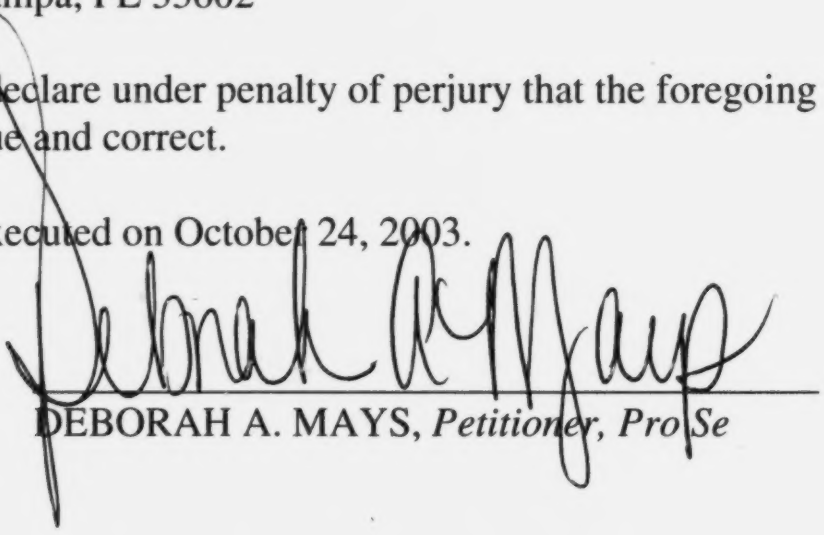
I, DEBORAH A. MAYS, do swear or declare that on this date, October 24, 2003, as required by Supreme Court Rule 29, I have served the enclosed Appendix Book One on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage pre-paid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:
Thomas M . Gonzalez, Esquire
Jason L. Odom, Esquire
Thompson, Sizemore & Gonzalez, P.A.

501 E. Kennedy Blvd., Suite 1400
Tampa, FL 33602

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 24, 2003.



DEBORAH A. MAYS, *Petitioner, Pro Se*